UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33

ARCHER DANIELS MIDLAND COMPANY (ADM)

and

BAKERY, CONFECTIONERY, TOBACCO WORKERS & GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO, CLC LOCAL 103-G,

Cases 25-CA-143250
25-CA-145578
25-RC-142796

EMPLOYER/RESPONDENT'S POST HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

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Employer/Respondent Archer Daniels Midland Company ("ADM" or "Respondent"), by its undersigned counsel, submits the following post-hearing brief in support of its position that the Judge should dismiss the Consolidated Complaint in its entirety and overrule the objections to the January 20-21, 2015 election filed by the Bakery, Confectionery, Tobacco Workers & Grain Millers International Union, AFL-CIO, CLC Local 103-G ("Union"). In support thereof, Respondent submits the following:

I. BACKGROUND

Pursuant to a petition filed on December 15, 2014, and a Stipulated Election Agreement approved by the Subregion's Officer-In-Charge on December 18, 2014, a secret ballot election was conducted on January 20 and 21, 2015 in the following unit of employees at Respondent's Bio Products facility in Decatur, Illinois:

> All full-time and regular part-time maintenance employees employed by the Employer in its Bio Products plant located in Decatur, Illinois; excluding all managers, professional employees, laboratory employees, office clerical

> employees, guards and supervisors as defined in the Act, and all other employees. (G.C. Ex. 1(l)).

The tally of ballots issued at the conclusion of the election reflects that out of approximately 62 eligible voters, 28 ballots were cast in favor of the Union, 33 ballots were cast against union representation, and there were no challenged ballots. (G.C. Ex. 1(l)).

On January 28, 2015, the Union filed five objections to conduct allegedly affecting the results of the election. (G.C. Ex. 1(l), Attachment A.) The Union subsequently requested, and the Regional Director approved, the withdrawal of Objections 1 and 5.

On April 30, 2015, the Acting Regional Director of Region 25, Subregion 33 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (G.C. Ex. 1(i)) alleging that ADM, by three supervisors and/or management representatives, violated Section 8(a)(1) of the Act in various respects, and further alleging that Respondent violated Sections 8(a)(1) and (3) of the Act by changing the location and length of maintenance employees' breaks and denying maintenance employees' personal holidays. In its answer, Respondent denied the substantive allegations of the Consolidated Complaint. (G.C. Ex. 1(k)).

On May 22, 2015, the Regional Director issued a Report on Objections, Order Consolidating Cases, Order Directing Hearing, and Notice of Hearing (G.C. Ex. 1(l)), consolidating for purposes of a hearing the remaining three objections raised by the Union with the unfair labor practice charges alleged in the Consolidated Complaint. This consolidated case was tried in Peoria, Illinois on July 23-24, 2015, before Administrative Law Judge Melissa M. Olivero.

II. STATEMENT OF FACTS

A. An Overview of ADM Bio Products

Located in Decatur, Illinois, ADM Bio Products processes corn dextrose into a number of food grade and industrial grade products for human and livestock consumption, including xanthan, threonine, lysine, sorbitol, lactic acid and others. (Tr. 239.) The manufacturing process begins in the Fermentation department where large tanks with rotating shafts stir the dextrose mixture until it is ready to be piped into the Refinery department. (Id.) Specialized products are subsequently made in the Bio2 department (human food grade products) and in the Poly-ol department (sweetener sorbitol). (Id.)

In addition to the operating departments of Fermentation, Refinery, Bio2 and Poly-ol, the plant has a Laboratory, Utility, Maintenance, and Human Resources department. (Tr. 239-40.) Mike Pasquariello became the Plant Manager at ADM Bio Products in March, 2014. (Tr. 223, 227.) Tracy Mosser has been the Human Resources ("HR") Manager since 2007. (Tr. 320.) Mosser is responsible for, among other things, tracking employees' use of Personal Holidays. (Tr. 320.) Prior to assuming her current position, Mosser was employed in positions where she had responsibility for safety, OSHA-related programs, inventory production and other HR functions including payroll and personnel filing since 1994. (Tr. 321-22.)

B. Organization of the Maintenance Department

Respondent employs about 61 maintenance employees who perform emergency repairs, preventative maintenance, replace seals and valves, and conduct testing to ensure equipment is working properly. (Tr. 38, 42.) Maintenance employees have job titles such as Millwright, Electrical and Instrumentation ("E&I") Tech, Tank Crew, Filter Tech, Probe Tech, and Valve Tech. Other maintenance employees are assigned to the receiving and storeroom or the plant's maintenance shop. (Tr. 240-41.) Maintenance employees are assigned to work in one of the

Plant's operating departments, which include Fermentation, Refinery, Bio2, Poly-ol, and Utility. (Id.) In addition, the plant has a Tank Crew, which consists of two 4-man teams who work a rotating 12-hour schedule with 85-90 percent of their time spent in the Fermentation department because that is where the vast majority of the tanks are located. (Tr. 241.) One of the four members of each Tank Crew is assigned to the "leadman" position and receives a higher hourly rate of pay for taking on additional leadership responsibilities with the Tank Crew. (Tr. 254, ER Ex. 13.)

Tony Facchinello was hired by Respondent as Maintenance Superintendent on July 7, 2014. (Tr. 236.) Before that, Facchinello spent 30 years in the U. S. Navy, retiring in the rank of Lieutenant Commander 04. (Tr. 237-38.) Butch Rentmeister has worked for Respondent as an hourly operator, millwright, Tank Crew leadman (for seven and one-half years), then as Maintenance Supervisor in Bio2, and Maintenance Supervisor in Poly-ol. Since December 15, 2014, Rentmeister has been the Fermentation Maintenance Supervisor. (Tr. 354-56.)

C. Personal Holidays and Time-Off Guidelines for Maintenance Employees

Bio Products' maintenance employees receive three (3) paid Personal Holidays each calendar year. Personal Holidays must be used within the calendar year. (Tr. 73, 283.) Employees can also "cash-in" their Personal Holidays to receive pay in connection with an otherwise-excused absence. (Tr. 288.) Employees can request a Personal Holiday by scheduling it in advance or by calling-off just before the start of their shift. (Tr. 73-76, 284.) The Superintendent within each department grants requests for Personal Holidays on a first come-first served basis and, in the maintenance department, the Superintendent evaluates requests in accordance with the Bio Products Maintenance Approved Time-Off Guidelines (the "Time-off Guidelines"), which reflect the maximum number of employees from a maintenance group or Tank Crew that can be approved for and granted paid time off from work each day. (Tr. 108, 285-87, ER Ex. 1.) The Guidelines have been posted in the plant and have been published to employees. (Tr. 107, 147.)

During the early morning hours on January 4, 2015, three members of the 4-person Tank Crew called just before their shift to request a Personal Holiday. (Tr. 289-93, ER Ex. 7.) Nick Mitchell was the first to call and his request for a Personal Holiday was granted. (Tr. 76.)[1] Greg Dennison was the second member of the 4-person Tank Crew to call-off; he requested an absence for FMLA leave, which Respondent is legally required to grant. (Tr. 108-110.) Dennison also "cashed in" one of his Personal Holidays in order to receive pay for his FMLA absence. (Tr. 110, 189.) Sean Kelly was the third member of the 4-person Tank Call to call-off on January 4, 2015. His request for a Personal Holiday was denied pursuant to the Time-Off Guidelines. (Tr. 111.)

General Counsel witness Mitchell admitted that Respondent acted consistently with the Time-Off Guidelines in denying Kelly's request for a Personal Holiday (Tr. 112) and therefore did not violate the Time-Off Guidelines on January 4, 2015. (Tr. 130.) General Counsel witness Kelly also admitted that Mosser and Rentmeister told him Respondent denied his Personal Holiday request because 2 members of the 4-person Tank Crew had called off and Kelly "agreed with their business outlook on that … you've got to run a business, I understand that." (Tr. 155-56, 338-39.)

Since January 4, 2014, application of the Time-Off Guidelines dictated every situation where Respondent was not able to grant a requested Personal Holiday. Evidence at the hearing showed that Respondent has denied other employee requests for a Personal Holiday where granting the request would violate the Time-Off Guidelines. (Tr. 294, ER Ex. 9.) For example:

- James Boatman was denied a Personal Holiday request on January 7, 2015 because another employee in his department (rotating shift storeroom attendants) was previously approved to be off for vacation. (Tr. 295, ER Ex. 9.)

- Cory Whitman was denied a Personal Holiday on January 9, 2015 because another employee (Kirk Camden) in his department (rotating shift storeroom

[1] General Counsel witness Mitchell testified that he has never been denied a Personal Holiday. (Tr. 74.)

attendants) was previously approved to be off for vacation. (Tr. 296-97, ER Ex. 9.)

- Bob Miller was denied a Personal Holiday on January 12, 2015 because another employee (Jobe Stevens) in his department (receiving storeroom) was previously approved to be off for vacation. (Tr. 297-98, ER Ex. 9.)

- Maintenance employee Sean Kelly was denied a Personal Holiday request on February 6, 2015 because one of his Tank Crew mates, Nick Mitchell, was absent for a pre-approved paid vacation. (Tr. 157-58, 298, ER Ex. 9.)

Before and after January 4, 2015, Respondent similarly denied Personal Holiday requests when granting the request would have violated the Time-Off Guidelines or taken the maintenance department below its minimum crew needs. (Tr. 145.) Respondent denied the following Personal Holiday requests from maintenance employees based on the Time-Off Guidelines and denied non-maintenance employees based on plant needs specific to their respective departments. (Tr. 333, ER Ex. 8.)

- On January 3, 2014, Rob Davis's request for a Personal Holiday was denied due to "not enough coverage" in his department (Bio2). (Tr. 333-34.)

- On January 11, 2014, Jim Foster's request for a Personal Holiday was denied because he was already covering work for another employee who was previously approved to be off in the Poly-ol department). (Tr. 334.)

- On February 21, 2014, Terry Adams's request for a Personal Holiday was denied because Respondent could not cover his absence at work in the Bio2 department. (Tr. 334-35.)

- On May 24, 2014, Ron Agee's request for a Personal Holiday was denied because he was scheduled to provide week-end coverage and there was no employee available to replace him in the Maintenance department. (Tr. 335.)

- On January 1, 2015, Tyler Brown's request for a Personal Holiday was denied because there were other employees previously approved to be off work in the Maintenance department. (Tr. 335-36.)

- On January 22, 2015, Eddie Johnson's request for a Personal Holiday was denied because he was covering for another employee previously approved to be off work in his Refinery department. (Tr. 336.)

- On February 10, 2015, Andy Meador's request for a Personal Holiday was denied because the maximum number of people were previously approved to be off within his department (Bio2). (Tr. 336.)

There is no evidence in the record that Respondent deviated from the Time-Off Guidelines in the past by granting paid Personal Holidays to employees beyond the maximum number described in the Time-Off Guidelines. General Counsel witness Mitchell also admitted that he was not aware of any such instances. (Tr. 129-30.) Importantly, there was no evidence presented by General Counsel that any of the above-mentioned Personal Holiday requests were denied for reasons other than adhering to the Time-Off Guidelines or that maintenance employees were in any way subjected to discriminatory denials of Personal Holiday requests on or after January 4, 2015.

D. Paid Rest Breaks for Maintenance Employees

At all relevant times, Respondent provided maintenance employees with a minimum of three paid breaks during an 8-hour shift, and as many as four or five paid breaks during 10-hour or 12-hour work shifts. The paid rest breaks are 10 minutes in duration and the paid meal periods are 20 minutes in duration. (Tr. 53-54, 90, 136, 323-24, ER Ex 3.) When Facchinello was hired in July 2014, all maintenance employees took their breaks in the maintenance break room,[2] which is located in the Refinery department, regardless of where they were assigned to work that day. (Tr. 263.) This practice created significant inefficiency due to lengthy travel times for employees walking or even driving from their often remote work areas to the maintenance break room, and overextending the time allotted for paid breaks. (Tr. 264-65.)

[2] The maintenance break room, which is also used for plant-wide training sessions and meetings, was completed in 2005. (Tr. 322.)

Respondent has stressed repeatedly to employees over the years that they should not over-extend their paid rest breaks beyond the 10 and 20 minutes provided. HR Manager Tracy Mosser did so in an Employee Quarterly Meeting in April 2014. (Tr. 102, 325-28, ER Ex. 11.) Superintendent Facchinello also stressed the policy soon after being hired in July 2014. (Tr. 101, 126.) On December 10, 2014 Facchinello again reminded employees, in writing, to limit breaks to 10 minutes and 20 minutes respectively. (Tr. 56, 270, GC Ex. 2.) Even the hourly employees who testified agreed that this was repeatedly emphasized by management: Employee Hadley testified that "over the years that's always been kind of brought up … just to kind of watch your length" of breaks. (Tr. 166.) Employee Dennison testified that he received annual reminders about not overextending breaks as "they tell us that once or twice a year that the breaks are ten, twenty, ten …." (Tr. 180.)

In September of 2014, Facchinello changed the location of breaks for Poly-ol maintenance employees from the maintenance break room to the Poly-ol department break room. (Tr. 90-91, 264-67, 357-58.)[3] Poly-ol employees told Facchinello they were concerned about too much "transit time" and Facchinello, after some consideration, agreed. (Tr. 313-14, 357-58.) Changing the location of the break room saved at least thirty-six (36) minutes of travel time per day for Poly-ol maintenance employees. (Tr. 93, 358.)

Rentmeister recommended to Facchinello that all maintenance employees should take their breaks in the area where they worked because he had done that as a Tank Crew leadman before Facchinello was hired at Respondent. (Tr. 361.) Respondent had a "past practice" of having maintenance employees break in the department where they worked, even after the maintenance break room was constructed, and both Rentmeister and Mitchell followed the "practice" of taking

[3] The break room in Poly-ol was remodeled to its present form in 2011. (Tr. 323.)

breaks in the Fermentation break room when they worked together in that area. (Tr. 98-99, 267, 361.)

Over the weekend of December 13-14, 2014, Facchinello decided that all maintenance employees should take breaks in the department they were working that day to reduce unnecessary travel time, similar to the break location practice implemented for Poly-ol employees. (Tr. 270-71, 361-62.) Facchinello communicated the change in a meeting with maintenance employees and then followed up with an email on December 17, 2014, to all maintenance employees stating they would take their rest breaks in the department where they were working. (Tr. 57-58, 271-72, GC Ex. 3.) Maintenance employees in the Refinery department continued to take breaks in the maintenance break room because the maintenance break room is physically located in the Refinery department. (Tr. 96, 273-74.) At the time Facchinello made the decision to change the location of rest breaks, he was not aware a union representation petition had been filed. (Tr. 276.)

By taking rest breaks in the department where they were working, instead of going back to the maintenance break room, employees by their own admission saved 2–4 minutes walking time, each way, for each of their multiple rest breaks during a shift. (Tr. 58-59.)[4] Facchinello and Rentmeister, in separate meetings with employees, told employees that unnecessarily long travel time was the reason for the change. (Tr. 138, 166.) As demonstrated by the map of the facility, which shows the location of each break room, and the presence of a break room in each of the

[4] Kelly testified it was 4 – 5 minutes walking time, each way, from Bio2 to the maintenance break room, and that it was 3 – 4 minutes walking time, each way, from Fermentation to the maintenance break room. (Tr. 138.) Applying simple mathematics, cutting a 3-minute one-way walk from the start and end of 5 breaks during a 12-hour shift would eliminate up to 30 minutes of walking time for each employee. Cutting a 5-minute, one-way walk would save up to 50 minutes of walking time per employee.

operating departments, employees significantly reduced their travel time when they started taking breaks in the departments where they were working. (Tr. 361-62, ER Ex. 6.)[5]

Maintenance supervisors do not take breaks in the same break room as hourly maintenance employees (Tr. 138-39), and maintenance supervisor offices are generally not on the same floor as employee break rooms. (Tr. 187-88.) Therefore, Facchinello continued to remind employees to adhere to the policy of 10-minute and 20-minute breaks, and he expected his supervisors to monitor the length of paid breaks. (Tr. 275, 280.) Rentmeister monitored employee break times when he was a supervisor in Poly-ol from 2013-2015. (Tr. 359.) After he transferred to Fermentation Maintenance Supervisor in December 2014, Rentmeister continued to make sure employees adhered to the 10-minute policy and were not abusing their paid break time. (Tr. 72, 103, 127, 131, 363-64.) Rentmeister passed by the Fermentation break room because it falls on the path that supervisors normally walk as they move about in the Fermentation area (Tr. 186-87). Rentmeister did so specifically at the start of the scheduled break time and the end of break time to make sure employees did not over-stay their breaks. (Tr. 72, 103-04.) Employee Greg Dennison testified that he observed several different supervisors walked by his break room at the start and end of the 10-minute breaks and that this break monitoring has continued after the election. (Tr. 181-82.) Additionally, the plant is a loud environment—employees must wear hearing protection in the production areas—and Mitchell admitted that due to the constant, loud noise, there was no way that any supervisor walking by the break room could hear conversations taking place within the break room. (Tr. 104.)

[5] Rentmeister testified that he consciously measured the distance and walking time as follows: 7 – 8 minutes, each way, from the Bio2 operations area to the maintenance break room (Tr. 364, ER Ex. 14A); 7 minutes, each way, from the Fermentation area to the maintenance break room (Tr. 364, ER Ex. 14A).

In January 2015, Mitchell informed Facchinello that the Fermentation break room was crowded when the operations and Fermentation maintenance employees' break times (including the Tank Crew) overlapped. (Tr. 100.) Facchinello suggested a solution – try to stagger the breaks. (Tr. 126.) When that did not resolve the concern, on January 26, 2015, Facchinello allowed Fermentation maintenance employees to take breaks in the maintenance break room, as Mitchell requested. (Tr. 99-100, 140, 277-80, GC Ex. 4.) Because this space limitation concern did not exist for Bio2 maintenance employees, they continued to take breaks in the Bio2 break room. (Tr. 280-82, ER Ex. 17.)

E. Previous Attempts to Organize The Maintenance Employees

In the last five years, the Board has conducted three elections among the Bio Products maintenance employees. The elections occurred in 2010, 2013 and, most recently, in January of 2015. (Tr. 41.) Nick Mitchell was a self-proclaimed "lead organizer" in the first and second campaigns and was "involved" in talking to employees about the Union in the third campaign. (Tr. 122.)[6] Both hourly employees and maintenance management have known for the last five years that Mitchell is a strong advocate for union representation in the maintenance department. (Tr. 150.)

F. Nick Mitchell Gave Conflicting Versions of His Union Support

Soon after Pasquariello started as the Plant Manager in March 2014, Mitchell approached Pasquariello to report that he had been physically threatened by a co-worker on the Tank Crew (Greg Dennison). (Tr. 225-27, 392.) During that conversation, Mitchell told Pasquariello that "he had been a big supporter of the second Union drive" and was "disappointed when the Union was

[6] During cross-examination at the hearing, Mitchell initially vehemently denied that he was the "lead union organizer" in the 2010 campaign. (Tr. 79.) Only after being confronted with his prior sworn statement did Mitchell reluctantly concede that he was "one of the" organizers of the campaign. (Tr. 82.)

not voted into the facility." (Tr. 226, 228.) Pasquariello responded by asking Mitchell why he would bring that up with a new plant manager. (Tr. 227-28.) Mitchell had no response and the conversation ended. (Id.) Respondent conducted an investigation into Mitchell's allegations against the co-worker; that investigation was concluded by May 22, 2014. (Tr. 407, ER. Ex. 18.)[7]

Mitchell again raised the subject of his personal involvement with the Union when he spoke to Facchinello on August 21, 2014. At that time, Mitchell was recovering from caustic exposure in the plant and spent a few days working in the maintenance office while he recovered. (Tr. 84-86, 247-48.) Facchinello had recently completed a series of small-group introductory meetings with maintenance department employees in July and August of 2014, but had not met with Mitchell due to scheduling conflicts. (Tr. 119, 246-48.) Facchinello testified in detail about the conversation, during which he and Mitchell shared many details about their personal backgrounds, family lives and work histories. (Tr. 249-51.) Mitchell then asked if Facchinello had heard rumors about Mitchell leading a union campaign in the plant. (Tr. 306.) Facchinello said yes and Mitchell responded, "I want you to know that's not true." (Tr. 251-52.) Mitchell told Facchinello that people "spread rumors" about him, including that he chews tobacco,[8] is not proficient in his work, and tends to procrastinate. (Tr. 252.) Facchinello told Mitchell he considered those to be "hearsay" comments and he had no independent way of knowing if the rumors were true. (Tr. 252.) Facchinello also told Mitchell that maintenance employees have the "prerogative" to organize a union, and if they chose to do so, "that's their right." (Tr. 253.)

[7] Although Mitchell denied these statements, he admitted to the same conversation Pasquariello described in which Mitchell complained of a co-worker threat against him. (Tr. 387-88, 392.) Mitchell claimed he had that conversation with Pasquariello in August, 2014. (Tr. 392). Pasquariello testified the conversation occurred in late March or early April of 2014. (Tr. 225.) Pasquariello's memory of the date was proven correct (ER Ex. 18) and his recollection of the content of the conversation, including Mitchell's voluntary, unsolicited union reference, is more credible than that of Mitchell.

[8] Mitchell's concern about rumors of him chewing tobacco surfaced again during a conversation that both men testified about concerning a lock-out/tag-out investigation. (Tr. 261.)

Three weeks after his in-depth conversation with Mitchell, on September 11, 2014, Facchinello promoted Mitchell to leadman of the 4-person Tank Crew. (Tr. 39, 254-55, ER Ex. 13.) Facchinello selected Mitchell for the promotion, which involved a pay raise, over the other two Tank Crew members based on Mitchell's experience, knowledge and seniority. (Tr. 255.) Facchinello and Mitchell offered starkly contrasting testimony about what happened the very next day. Mitchell says he spoke to Facchinello the day after Facchinello promoted him to leadman and Facchinello said, "Nick I know that you ran the last two campaigns" and if he found out Mitchell was involved in a campaign he would be "disappointed." (Tr. 45.) Facchinello denied that he even spoke to Mitchell on September 12, much less that he brought up the union, and Facchinello denied that he *ever* told Mitchell that he found out Mitchell ran the previous two union campaigns. (Tr. 261.)

G. <u>Alleged Conversation Between Facchinello and Logue</u>

Another employee also discussed with Facchinello his displeasure with Mitchell. Kyle Logue works on the Tank Crew with Mitchell. (Tr. 39.) Logue routinely saw Facchinello in the locker room when Logue was changing out of his work clothes at the end of a shift and Facchinello was arriving to work. (Tr. 194-95, 261-63.) On several occasions, Logue complained to Facchinello about Mitchell's performance as leadman on the Tank Crew, Mitchell lacked job-related knowledge necessary to troubleshoot an agitator seal, Mitchell did not know how to "dial in a shaft," and Mitchell often was not present to lead and manage the Tank Crew, leaving others to do the work. (Tr. 410-11, 418.) Logue made the same complaints to Rentmeister. (Tr. 471-18.)[9] Logue also complained to Facchinello "at least four or five times" in the locker room that,

[9] Rentmeister testified that Logue complained to him that Mitchell "should not be the leadman of the tank crew, Nick doesn't know what he's doing when it comes to dialing a shaft, Nick doesn't know how to do seal checks." (Tr. 418.)

"I'm frustrated with Nick talking to me about the Union and wanting me to sign a union card." (Tr. 262.) Facchinello responded with words to the effect that he was not involved in the union, that he was not the person to help Logue with that and that Logue should talk to somebody in HR about that because Facchinello just did not know enough about it. (Tr. 262.)

Logue testified that he did not recall making any of the numerous complaints about Mitchell to Facchinello, but he inexplicably had a distinct recollection that, on one occasion, Facchinello "kind of chuckled and said, 'So is Nick forcing you to go Union yet?'" Logue claimed that he responded, "Nobody forces me to do anything, and I make my own decisions." (Tr. 195.) No other witnesses were present. Facchinello denied ever asking that question or any such question. (Tr. 261.) Logue said that Facchinello then "talked to me about building a house, I believe it was. It was family talk." (Tr. 204.) Logue insisted that he did not recall any of the other statements about Mitchell or the union he had with Facchinello or Rentmeister. (Tr. 195.)[10]

H. Employee Meeting with Dave Pickett

On January 6, 2015, Dave Pickett, a Senior Employee and Labor Relations Representative for Respondent, held an information meeting with a small group of Bio Products maintenance employees, which was also attended by Mosser and Dean Espenschied, an ADM Labor Representative. (Tr. 30-31, 339, 377-78.) Mitchell, whom Pickett knew because, in 2013, Mitchell introduced himself to Pickett as a Union organizer, was one of about 12 – 15 maintenance employees in attendance. (Tr. 113, 315, 379.) No maintenance managers or supervisors were present. (Tr. 378.)

[10] Logue's memory of Facchinello's alleged inquiry is suspect due to his inability to remember, on cross-examination, whether it happened before or after the union election in 2015, or in 2014, or in which month it occurred, if at all. (Tr. 203.)

During the meeting, Pickett presented information about the upcoming union election and the voting process and then responded to questions from the audience. (Tr. 377.) Right off the bat, Mitchell asked several questions. (Tr. 114-15, 231, 339-43, 381-82.) Mitchell's questions to Pickett drew a lot of attention from the employees in the audience and, at one point, prompted another employee to ask Mitchell "if he would please be quiet so others could ask questions". (Tr. 382.)[11]

In response to questions concerning which he did not know the answer, Pickett encouraged the employees to ask their questions to the Union. (Tr. 383.) Employee Steve Hartwig testified that he asked Pickett at the meeting "about the Union cards" and "where they were signed." (Tr. 231, 342-43.) According to Hartwig, Pickett responded, "I have no idea" and then said, "ask the Union about that." (Tr. 231, 342-43, 380-81.) Pickett similarly testified that he responded to Hartwig by saying "You would have to ask the Union." (Tr. 380.) Hartwig then turned to Mitchell and asked Mitchell directly, "When were the cards signed?" (Tr. 381.) Neither Hartwig, Pickett nor Mosser testified that Pickett directed that question to Mitchell or ever suggested that Hartwig should ask Mitchell. (Tr. 116, 232, 341-43, 381-82.)[12]

Mosser also testified that Hartwig asked Mitchell directly, "What can a union do for me?" (Tr. 341.) However, Hartwig did not recall the content of any question that Pickett may have asked Mitchell. (Tr. 232-33.) Mosser and Pickett testified that Pickett did not refer any employee questions to Mitchell and did not single out Mitchell for having engaged in any union activity at the meeting. (Tr. 341-43, 381-84.)

[11] The number of question asked by Mitchell could explain why Sean Kelly, who also attended the meeting but recalled no details about any questions or statements by Pickett, said it "seemed like" Pickett cast his eyes toward Mitchell during three-quarters of the meeting. (Tr. 134-36.)

[12] Greg Dennison attended the meeting and the only thing that Dennison could recall was a general remark that Pickett said, "If you need to know about the Union, you need to talk to Nick Mitchell." (Tr. 175-76.)

I. Rentmeister's Alleged Questions to Employees

At some unspecified time in January 2015, General Counsel witness Martin Hadley claimed he was in the multi-desk office of Supervisor Butch Rentmeister when Rentmeister allegedly asked Hadley, "Well, why do you guys want to get a union in here?" (Tr. 163, 368.)[13] Hadley responded, "Well, probably the same reason why you [Butch Rentmeister] tried to get one in here." (Tr. 164, 368.) Rentmeister did recall that Hadley gave the quoted response, but Rentmeister denied that he was the person who asked the question. (Tr. 368.) Rentmeister testified that he shares an office with four other individuals and, in the mornings when Tank Crew members like Hadley come in to receive their daily assignments, there are "anywhere from twenty to thirty people in there" and it is a room full of people. (Tr. 368-69.) Thus, while Rentmeister "overheard [Hadley] talking with another gentlemen in my office," he did not know who asked the question that prompted Hadley's response. (Tr. 369.) Rentmeister also testified that, "They [maintenance employees] would come into my office and talk about it [union activity] daily, as they did poly-ol. I would not engage in those conversations." (Tr. 370.) According to Hadley, on the day in question, after he gave his one-sentence response to the question, Rentmeister said nothing at all and that was the full extent of the discussion. (Tr. 164, 368.)

General Counsel witness Greg Dennison claimed that, sometime before the election, when he was in the same multi-desk office area filled with employees, contractors and others on a daily basis, Rentmeister asked Dennison, "what my thoughts were, how the campaign was going." (Tr. 178.) Dennison recalled that a different person (John Dodwell, a utility operations supervisor (Tr. 190, 369)) interjected and told Rentmeister "he wasn't allowed to be asking questions like that."

[13] Hadley's memory as to the date of this alleged question lacks credibility insofar as he also testified incorrectly about other events (i.e., remembering that Facchinello changed the location of breaks in January 2015 when it is undisputed that Facchinello actually did so in mid-December of 2014).

(Id.) Dennison did not say anything at all. (Id.) Rentmeister did not recall any such question, nor that was he told by another person about what he should or should not say. (Tr. 369-70.) No other person was called to testify about Rentmeister's alleged statement. The only person to testify, Dennison, acknowledged that Rentmeister said nothing more after the interjection by Dodwell and that Rentmeister did not prompt Dennison for any response. (Tr. 178.)

III. ARGUMENT

A. GENERAL COUNSEL FAILED TO MEET ITS BURDEN OF PROVING THAT RESPONDENT DENIED MAINTENANCE EMPLOYEES' PERSONAL HOLIDAYS IN VIOLATION OF SECTION 8(a)(1) AND (3) OF THE ACT.

General Counsel alleges a violation of Section 8(a)(1) and (3) in that, since January 4, 2015, Respondent denied maintenance employees' personal holidays because the employees supported the Union and engaged in concerted activities and to discourage them from such activities. (Consol. Compl. ¶ 6(b)-(c).) However, the evidence introduced at the hearing unequivocally shows that Respondent's Personal Holidays policy and practice was objectively applied to maintenance employees and remained consistent before, during, and after January 4, 2015. General Counsel introduced no evidence that any maintenance employee was denied a Personal Holiday because he supported the union or engaged in concerted activities, or to discourage employees from doing so. To the contrary, Respondent's evidence established that the Bio Products Maintenance Department Approved Time-Off Guidelines determine when a request for a paid Personal Holiday can be granted and that Respondent consistently applied the Guidelines in approving or denying Personal Holiday requests on January 4, 2015 and all times thereafter.

To establish a violation of Section 8(a)(3), General Counsel bears the burden of proving, by a preponderance of the evidence, that the employees' protected conduct was a motivating factor in the employer's adverse action. *El Paso Electric Co.*, 355 NLRB No. 71 (2010) (no violation

where General Counsel failed to establish that employee's union activity was motivating factor in denial of leave request and employer had past practice requiring employees to request time off at least a week in advance, citing *Wright Line*, 251 NLRB 1083 (1980).) To the extent that General Counsel argues the timing of any Personal Holiday denial is evidence of an unlawful motive, that argument should be rejected. As the Board held in *El Paso Electric Co.*, the timing of the employee's request is what determined the timing of Respondent's response and, under such circumstances, "the probative value of a temporal relationship between the employer's action and the employee's protected activity is diminished." 355 NLRB No. 71, at *2.

Where, as in this case, there is no evidence that the employer discriminatorily applied its policy or that employees were unaware of the policy, there is no violation of the Act. *In re Quick Find, Co.*, 262 NLRB 341 (1982) (no violation where employer withheld vacation pay pursuant to long-established rules). As explained below, the evidence establishes that Respondent did not deviate from its past practice in evaluating whether it could grant or deny Personal Holiday requests. Respondent's practice was based on written guidelines, well-known to employees, and Respondent did not treat any employee in a disparate manner. Accordingly, General Counsel failed to prove a violation of the Act by Respondent's denial of Personal Holidays and that allegation of the Consolidated Complaint must be dismissed.

1. The Evidence Establishes That Respondent Evaluated Personal Holiday Requests According to the Well-Known Time-Off Guidelines Criteria Since January 4, 2015.

It is undisputed that, in the early morning hours before the start of their 6:00 a.m. shift on January 4, 2015, three members of the 4-person Tank Crew all called-off work and attempted to use a paid Personal Holiday to be excused. According to the Time-Off Guidelines, if the Tank Crew already has one person pre-approved for a Personal Holiday or Vacation, any other requests for a Personal Holiday will be denied. Respondent treats Personal Holiday requests on a first-

come, first-served basis. Thus, as Mitchell was the first in time to request a Personal Holiday for January 4, his request was granted. When Dennison called in a short time later to announce that he was taking an FMLA-approved day off, he was able to cash-in a Personal Holiday for payment purposes only. Absent Dennison's use of FMLA leave, he would have been denied the use of a Personal Holiday because Mitchell was already approved. It was no surprise that when Kelly called off just 15 minutes later and requested to use a Personal Holiday, Respondent denied Kelly's request because Mitchell was already approved. Thus, only Kelly was denied use of a Personal Holiday on January 4, and the reason for the denial was based on the Approved Time-Off Guidelines, as explained by Facchinello and Mosser.

Compared to the strength of Respondent's evidence, General Counsel offered no evidence whatsoever that Kelly was denied a Personal Holiday because of his Union support (indeed there was no testimony that Kelly ever showed any support for the Union). In addition, any notion that Kelly engaged in concerted activity is dispelled by his own testimony that he did not speak to or with either Mitchell or Dennison concerning his or their request for a Personal Holiday on January 4, 2015. (Tr. 155.) Indeed, Kelly admitted at the hearing that he understood why his request was denied by Respondent. (Tr. 155-56, 338-39.) Similarly, when the chronology of events was explained to Mitchell during cross-examination at the hearing, he readily admitted that Respondent acted consistently with the Time-Off Guidelines in denying Kelly's request for a Personal Holiday (Tr. 112) and that there was no violation of the Time-Off Guidelines by the Company on January 4, 2015. (Tr. 130.)

General Counsel similarly failed to establish any violation of the Act in connection with four other Personal Holiday request denials by maintenance employees after January 4, 2015. Respondent submitted credible testimony and documents that each of the four denials was based

on application of the Approved Time-Off Guidelines to the maintenance groups in which those individuals were working at the time. Specifically, between January 7 and February 6, 2015, four employee requests to use a Personal Holiday were denied because other employees in their respective departments were previously approved to be off for vacation. (Tr. 295-98, ER Ex. 9.)

Respondent also established that, since January 4, 2015, non-maintenance employees have been denied the use or Personal Holidays when granting the request would have deprived their respective department of the minimum crew needed for operations. In particular, Refinery operations employee Eddie Johnson and Bio2 operations employee Andy Meador were denied a Personal Holiday because of pre-approved time-off requests or scheduling matters. (Tr. 336, ER Ex. 8.)[14] Thus, the evidence shows that Respondent applied its practice in a consistent manner with regard to maintenance employees covered by the union representation petition and to employees outside the maintenance department.

2. The Evidence Establishes That Respondent Evaluated Personal Holiday Requests According to the Same Objective Criteria Before January 4, 2015 and Did Not Deviate During the Union Campaign.

Respondent also established through credible testimony and documentary evidence that, before January 4, 2015, it applied the Time-Off Guidelines to approve or deny Personal Holiday requests. (Tr. 333, ER Ex. 8.) In calendar year 2014, Respondent denied Personal Holiday requests made by four other employees, including maintenance and non-maintenance employees, when granting the request would have deprived their respective department of the minimum crew needed for operations. (See ER Ex. 8, Tr. 333-36, evidencing denials to employees Rob Davis,

[14] Kyle Logue, too, admitted that he tried to request a Personal Holiday when one of his 4-person Tank Crew members was already out for a scheduled vacation (Mitchell, again) and his request was denied for that reason. (Tr. 205.) Logue guessed this request was made in April, 2015, but as it was not among the allegations raised by the General Counsel. The exact date was not offered into evidence nor was there any suggestion by General Counsel that the denial was in any way improper or otherwise at issue in this proceeding.

Jim Foster, Terry Adams, Ron Agee and Tyler Brown.) Contrasted with the high number of Personal Holiday requests that Respondent was able to grant to both maintenance and non-maintenance employees (see ER Ex. 10), there is absolutely no basis for any finding that Respondent singled out maintenance employees and denied their use of Personal Holidays because they supported the Union or engaged in concerted activities or to discourage them from engaging in these activities. Accordingly, General Counsel has failed to prove the allegations in Paragraph 6(b) and (c) of the Consolidated Complaint.

B. GENERAL COUNSEL FAILED TO MEET ITS BURDEN OF PROVING THAT RESPONDENT CHANGED THE LOCATION AND LENGTH OF PAID REST BREAKS IN VIOLATION OF SECTION 8(a)(1) AND (3) OF THE ACT.

General Counsel alleges that on December 17, 2014, Respondent violated Section 8(a)(1) and (3) when it changed the location and length of its maintenance employees' breaks because the employees supported the Union and engaged in concerted activities and to discourage them from such activities. (Consol. Compl. ¶ 6(a), (c).) General Counsel also alleged that Respondent violated Section 8(a)(1) when it changed the location and length of the breaks because it created an impression among employees that their union activities were under surveillance and that Respondent engaged in surveillance of employees' union activities. (Consol. Compl. ¶ 5(c).) However, General Counsel failed to provide any evidence that the length of paid rest breaks was ever changed at all, or that the location of paid rest breaks was changed for anything other than legitimate business reasons wholly unrelated to union activities. General Counsel also failed to come forward with evidence that Respondent created an impression of or actually engaged in surveillance of union activities. Indeed, the consistent and credible testimony from numerous witnesses, including hourly employees, was that Respondent changed break locations as part of series of changes that started months before the union petition was filed and to reduce unnecessary

travel/walking time. Respondent also demonstrated that its supervisors remained vigilant as they had been since 2014 in ensuring that employees did not over-extend their paid rest breaks beyond the 10-minutes and 20-minutes policy that has been in place for many years. Accordingly, General Counsel failed to prove a violation of the Act through Respondent's change in location or length of employees' paid rest breaks and those allegations of the Consolidated Complaint must be dismissed.

1. The Evidence Establishes That Respondent Never Changed the Length of Rest Breaks.

As a threshold matter, no evidence was presented that Respondent ever changed the length of maintenance employees' paid rest breaks. Respondent has consistently provided over the years paid rest breaks of 10 minutes and paid meal periods of 20 minutes. (Tr. 53-54, 90, 136, 323-24, ER Ex 3.) No witness testified that Respondent shortened the 10-minute or 20-minute breaks at all, let alone because of union activities. Thus, this allegation fails for lack of any support in the record.

2. The Evidence Establishes That Respondent Changed Rest Break Locations For Some Employees to Reduce Unnecessary Travel/Walking Time and Not in Response to Union Activity.

Similarly, the record is bereft of evidence that Respondent's change in the location of rest breaks for some maintenance employees, which began in September 2014 (months before the petition was filed) and continued through at least January 26, 2015, (after the election was concluded), was connected in any way to union activities or surveillance of union activities. Facchinello testified that upon his hiring in July 2014 he noted the inefficiency of all maintenance employees traveling to and from the maintenance break room, which is located on a lower level and is demonstrably not located in the center of the facility. (ER Ex. 6, Tr. 97, 263-65.) Facchinello did not rush to make changes. He needed to understand the maintenance department

and consider how it worked. (Tr. 246-47, 263-67.) After two months of consideration (Tr. 313-14, 357-58), in September of 2014, Facchinello changed the location of breaks for Poly-ol maintenance employees from the maintenance break room to the Poly-ol department break room. (Tr. 90-91, 264-67, 357-58.) Several witnesses confirmed that this change in location saved considerable time that had been spent on unnecessary travel from their work area to the maintenance break room. (Tr. 93, 358.)

During the months of October and November, Facchinello continued to assess maintenance department operations. (Tr. 263-67.) He observed that the amount of time employees were away from their work areas for rest breaks far surpassed the 10-minute and 20-minute periods provided. (Tr. 148-49, 265.) Facchinello observed that maintenance employees spent an inordinate amount of time simply walking from the area in which they were working to and from the maintenance break room. (Tr. 265.) This walking time was neither rest for the employees nor productive time for the Company.

On about December 13, Facchinello decided that all maintenance employees should take breaks in the department they were working that day to reduce unnecessary travel time. (Tr. 270-71, 361-62.) Each operating area had its own break room, and it was separate from maintenance supervisor offices – even on different floors in most cases. (Tr. 187-88, 268, 274-75.) Rentmeister told Facchinello that, before Facchinello came to ADM, maintenance employees took breaks in the operating area break rooms. (Tr. 361-64.)

Facchinello told employees about the change in a meeting. Facchinello and Rentmeister, separate from each other, told employees that travel time concerns prompted the change. (Tr. 138, 166.) Later, to reach employees who were not present for the meetings at which the change was announced, Facchinello sent an email on December 17, 2014 to all maintenance employees stating

they would take their rest breaks in the department where they were working. (Tr. 57-58, 271-72, GC Ex. 3.) Of course, this did not create any change for maintenance employees working in the Refinery department, because the maintenance break room was actually located in the Refinery department. (Tr. 96.)

This change represented a return to the Company's past practice of having maintenance employees break in the department where they worked, as Mitchell testified that even after the maintenance break room was constructed, he followed the "practice" of taking breaks in the fermentation break room when he was working in that area. (Tr. 98-99, 267, 361.) Every witness acknowledged that the change in location saved walking time from their work area to the maintenance break room. (Tr. 93, 358.) This fact is reinforced by looking at the map of the facility, which shows the location of each break room, and indisputably shows that maintenance employees reduced their travel/walking time when they started taking breaks in the departments where they were working. (Tr. 361-62, ER Ex. 6.)

The final change occurred on January 26, 2015. Mitchell informed Facchinello that the Fermentation break room was crowded when the operations and maintenance employees' break times overlapped. (Tr. 100.) Facchinello thus allowed Fermentation maintenance employees to take breaks in the maintenance break room because of the space limitations in the Fermentation break room. (Tr. 99-100, 140, 277-80, GC Ex. 4.) No other maintenance employees were impacted by the January 26, 2015 change. (Tr. 280-82, ER Ex. 17.)

3. General Counsel Failed to Meet the Burden of Proof to Show a Violation of the Act by Respondent's Change to Rest Break Locations For Certain Employees to Reduce Unnecessary Travel/Walking Time.

The nature of the alleged Section 8(a)(3) violation here does not involve conduct that is "inherently destructive of employee rights" and thus General Counsel must establish that the Respondent's change in location of break rooms was actually motivated by a desire to penalize or

reward employees for union activity or the lack of it. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 65 LRRM 2465 (1967) (where the employer has come forward with evidence of legitimate and substantial business reasons, the General Counsel must prove antiunion motivation to sustain a Section 8(a)(3) violation). Because General Counsel has not proved an unlawful purpose, and no unlawful purpose can be reasonably inferred as a matter of law, Respondent did not violate the Act.

General Counsel presented no evidence of any statements or communications that link the change in break location to the employees' union activity or even that management was aware of any such activity in September, 2014 or the early part of December 2014 when Facchinello decided to make the change.[15] General Counsel apparently intends to rely solely on the coincidence of the timing of Facchinello's email of December 17, 2014. However, the record evidence clearly shows that the decision was made *before* the petition was filed and, in fact, was merely a continuation of the same change that had been instituted for some maintenance employees as far back as September of 2014. Thus, General Counsel's allegation that break locations were changed because the employees supported the Union and engaged in concerted activities and to discourage them from such activities fails for lack of any support in the record.

4. The Evidence Establishes That Respondent Monitored Employee Breaks to Prevent Over-Extension of Paid Break Time and Not to Spy on Union Activities.

Long before the most recent union organizing campaign began, Respondent stressed repeatedly to its employees that they should not over-extend their paid rest breaks beyond the 10 and 20 minutes provided. Mosser stressed that point during an Employee Quarterly Meeting in

[15] Facchinello testified that at the time he decided to change the remaining employee break locations, he was not aware a union petition for election had been filed. (Tr. 276.)

April 2014. (Tr. 102, 325-28, ER Ex. 11.) Facchinello also stressed the point in July 2014. (Tr. 101, 126.) Even General Counsel's witnesses testified they had been told, repeatedly over the years "to kind of watch your length" of breaks (Tr. 166) and that "the breaks are ten, twenty, ten …." (Tr. 180.) On December 10, 2014 Facchinello again reminded employees, in writing, to limit breaks to ten minutes and twenty minutes respectively. (Tr. 56, 270, GC Ex. 2.)

Because supervisors do not take breaks in the same area as hourly maintenance employees, Facchinello expected his supervisors to monitor the length of paid breaks. (Tr. 275, 280.) This was not a new initiative. Rentmeister testified that he monitored employee break times when he was a supervisor in Poly-ol from 2013-2015 and did so as Fermentation Maintenance Supervisor in December 2014. (Tr. 72, 103, 127, 131, 363-64.) Rentmeister's passing by the Fermentation break room was not out of the ordinary because the break room is in the path that a supervisor such as Rentmeister, or Eric Wright before him, normally walks as they move about in the Fermentation area. (Tr. 186-87.)[16]

Employees testified that they observed supervisors walk by the break room at the beginning (10:00 am) and end (10:10 am) of scheduled break times. That is entirely consistent with trying to ensure that employees do not over-extend their paid breaks. In addition, employees testified that the plant is a loud environment – ear plugs are required on the production floor – and that there is no way a supervisor walking by could hear anything being said in the break room. Employee Nick Mitchell admitted that due to the constant, loud noise in the plant, there was no way that any supervisor walking by the break room could hear any conversations taking place in

[16] Employee Dennison testified that several different supervisors walked by the break room at the start and end of the 10-minute breaks and that this break monitoring "continued to happen" even after the election. (Tr. 181-82.)

the the break room. (Tr. 104.) No witness testified that a supervisor ever entered the break room or tried to overhear anything being said by the employees in the break room.

The mere observation of employee activity conducted on the employer's premises is not a violation of the Act. For a supervisor to look at employees from the vantage point of his assigned place of work without any proof that he knew those employees were engaged in union activity at the time, cannot be unlawful, as the Board has repeatedly held. *See, e.g., The Well-Bred Loaf,* 303 NLRB 1016 (1991); *Honda of Mineola,* 218 NLRB 486 (1974). In *Wal-Mart Stores, Inc.*, 350 NLRB 879 (2007), the Board found that the employer did not violate the Act by surveilling activity in a break room where managers and supervisors commonly used the break room and it was not established that supervisor's presence in break room was for the purpose of surveilling union activities. Similarly, there is no violation of the Act where the surveillance is for some other purpose, such as monitoring arrival times or ensuring productivity. Thus, the Board upheld the ALJ's finding in *Documation, Inc.*, 236 NLRB 706 (1982), that even where the employer admitted to keeping an employee under surveillance, "such surveillance was not related to any union activities . . . but was directed to determining his times of arrival to and departure from work." *Id.* at 711.

The evidence in the record shows that supervisors, including Rentmeister, watched employees, on the Respondent's premises only, because they were concerned that employees were over-extending their paid rest breaks. Moreover, the evidence establishes that supervisors did so from *outside* the break room, where they could not possibly hear the content of any employee conversations from within the break room. That does not constitute unlawful surveillance. Moreover, even if the employees are talking about union support or activity, supervisors do not "create an unlawful impression of surveillance by appearing to monitor union activity that is

conducted openly, particularly when it occurs on company property." *Wal-Mart Stores, Inc.*, 350 NLRB 879 (2007); see also *Days Inn Mgmt. Co.*, 306 NLRB 92 (1992) (no violation where supervisors did not take notes, converse with employees or attempt to impede activities).

There was no evidence presented of any activity by supervisors other than that which is consistent with monitoring the 10-minute break periods. Accordingly, General Counsel has failed to offer any support for the allegation that Respondent created an impression of or actually conducted any surveillance of union activities.

C. GENERAL COUNSEL FAILED TO PROVE THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT:

1. Paragraphs 5(a), (b), (d) and (e): The Credible Evidence Establishes That Respondent Did Not Violate The *Rossmore* Standards And Did Not Coercively Interrogate Employees or Create an Impression of Surveillance.

Facchinello and Rentmeister specifically and credibly denied the allegation that they interrogated any employee regarding their union activities or support for the union during the post-petition period. Facchinello and Rentmeister were far more credible than General Counsel witnesses Mitchell, Hadley, Logue and Dennison and, therefore the Judge should rely on the testimony from Facchinello and Rentmeister concerning these alleged events. Based on the testimony of Respondent's witnesses, it is clear that Facchinello and Rentmeister did not unlawfully interrogate any employee and these allegations of the Consolidated Complaint should be dismissed.

The Judge should discredit the testimony of Mitchell, Hadley, Logue and Dennison, each of whom testified to different alleged statements but none of whom corroborated any other alleged statement by Facchinello or Rentmeister. Indeed, each of the alleged interrogations cited by the General Counsel occurred either in a one-on-one setting or, if others were present, not a single corroborating witness was called to testify. Mitchell's testimony is not credible because it was

shown to be inconsistent in several instances on cross-examination. For instance, Mitchell initially denied that he was a leader in any of the union campaigns but, when confronted with his prior sworn statement saying exactly that, he claimed he misunderstood the question. His explanation is not plausible. In a second instance, Mitchell denied that he told Plant Manager Pasquariello that he was disappointed the union had lost the election during a conversation in August, 2014. Mitchell said he complained about a co-worker threat during this same conversation. Mitchell was proven wrong by the testimony of Pasquariello, Mosser, and the Company's investigation report (ER Ex. 18) establishing that the conversation took place many months earlier, just as Pasquariello testified. Third, Mitchell denied that, on August 21, 2014, he told Facchinello that rumors of his union support, tobacco use and procrastination were untrue. Yet, Facchinello's specific testimony presented a far more believable account of the conversation. In addition, Mitchell later admitted the topic of his alleged tobacco use arose in conversation with Facchinello and it is thus likely that occurred on August 21, 2014 in connection with the other "rumors" that Mitchell tried to disavow.

For these reasons, the Judge should not credit Mitchell's testimony that Facchinello told him, during a one-on-one conversation on September 12, 2014, that he knew Mitchell was involved in the previous union campaigns and he would be "disappointed" if Mitchell was involved. Facchinello directly rebutted that testimony. He testified that he promoted Mitchell to leadman on September 11 (which Mitchell acknowledges), even though Mitchell had voluntarily raised the union "rumors" in a conversation between the two men three weeks earlier. Even if the Judge finds there was some communication on September 12 between Mitchell and Facchinello, there is no evidence that Facchinello asked any questions that probed into Mitchell's individual views or feelings on union representation, whether he had signed authorization cards, or how he

intended to vote if an election were held. There is also no evidence that Facchinello's alleged statement was accompanied by any direct or implied promises or threats.

The other alleged interrogation by Facchinello was also a one-on-one conversation that allegedly occurred in the men's locker room between Facchinello and Kyle Logue. Facchinello testified that Logue volunteered many complaints about Mitchell, including that Mitchell was trying to get Logue to sign a union card. Logue denied ever raising any such concern or any of the several detailed concerns that Facchinello (and Rentmeister) testified about. Given the detail of Facchinello's testimony about Logue's complaints, and the fact that Rentmeister independently testified that Logue made very similar complaints to him, it is simply not believable for Logue to deny any recollection of the many concerns he raised about Mitchell. It is more likely that Logue's selective memory was influenced by the presence of Mitchell at the hearing and a desire to avoid criticism of a co-worker. Accordingly, the Judge should not credit Logue's testimony about Facchinello's alleged interrogation. However, even if Logue's testimony is credited, there is no evidence that Facchinello asked any questions that probed into Logue's individual views or feelings on union representation, whether he had signed authorization cards, or how he intended to vote if an election were held. Also, there is no evidence that Facchinello's alleged statement was accompanied by any direct or implied promises or threats.

General Counsel alleges that Facchinello informed Mitchell, or Logue, that he was aware of their past union activity and thereby created an impression that their current union activities were under surveillance by Respondent. (Consol Compl. ¶5(a)(ii) and (b)(ii).) There is no evidence to support these allegations. The testimony of Facchinello, Pasquariello, Pickett and employee Sean Kelly (plus the discredited testimony of Mitchell) shows that Mitchell himself volunteered the subject of his past union activity on multiple occasions. Mitchell introduced

himself to Pickett in 2013 as a union organizer, told Pasquariello in April 2014 he was involved in a prior Union campaign, and made a point in August 2014 to deny to Facchinello "rumors" that Mitchell was involved with the union. Similarly, Facchinello credibly testified that Logue volunteered four or five times in or around December 2014 that Mitchell was talking with Logue about the union. An employer creates the impression among employees that their union activities are under surveillance when it tells them that it is aware of their union activities but fails to tell them the source of that information. *The Register Guard*, 344 NLRB 1143 (2005). Here, there is no credible evidence that Facchinello told Mitchell or Logue he knew about their past union activity or was interested in any current union activity. Moreover, even if the Judge credits the testimony of Mitchell and Logue in this regard, both men were keenly aware of the source of the information – Mitchell. Thus, under Board law, there is no basis for finding a violation the Act.

The two alleged interrogations by Rentmeister are even more suspect when the record testimony is closely examined. (Consol. Compl. ¶5(e).) Hadley and Dennison both claim that, at separate times in January 2015, they were in the maintenance office, near Rentmeister's desk, and Rentmeister blurted out of the blue a question to them about the union campaign. However, Rentmeister credibly denied both accusations. Moreover, despite the fact that these alleged incidents occurred with other employees nearby, no corroborating witnesses were called to testify.

Rentmeister testified that maintenance employees routinely discussed the union campaign among themselves in his presence and that he stayed out of the conversations. However, even if Hadley's testimony and Dennison's testimony is credited, they each admitted that, in their separate instances, Rentmeister stopped the conversation immediately and nothing he allegedly said was accompanied by any direct or implied promises or threats.

It is well settled that questioning employees about protected activities is not *per se* unlawful. In determining whether an employer's questioning of employees about union and protected activities violates the Act, the Board assesses the totality of the circumstances in which the questioning takes place. *Rossmore House*, 269 NLRB 1176 (1984), *aff'd sub nom. Hotel Employees Union Local 11 v. N.L.R.B.*, 760 F.2d 1006 (9th Cir. 1985). Among the factors weighed in this analysis are the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Id.* at 1178 fn. 20.

Here, Facchinello's alleged questioning of Mitchell and Logue, to the extent those separate incidents even occurred, was noncoercive and did not violate the *Rossmore* standards. Similarly, Rentmeister's alleged questions to Hadley or Dennison, to the extent either event even happened, were noncoercive and did not violate the *Rossmore* standards. It is clear that neither Facchinello nor Rentmeister ever asked the employees any questions about their individual views concerning the union, the views of other employees about the union, about authorization cards, or how they intended to vote in the election. Instead, even if the Judge credits the General Counsel witnesses' testimony, the questions at most were an innocuous query as opposed to probing into the employees' union or protected activities. Importantly, there is no evidence that any questions were accompanied by any direct or implied promises or threats.

Under the totality of these circumstances, it simply cannot be said that Facchinello or Rentmeister coercively interrogated employees during any isolated conversation. *See, e.g. Southern Monterey County Hospital*, 348 NLRB No. 15, slip op. at 4 (2006) (questioning of open union adherents about statements attributed to them in a flier held not violative of *Rossmore* standards); *U-Haul Company of California*, 347 NLRB No. 34, slip op. at 3-4 (2006) (question posed to open union supporter about union activities found not coercive where the question was

not about the union supporter's personal sentiments about the union or those of other employees); *Enloe Medical Center*, 345 NLRB No. 54, slip op. at 3-4 (2005) (questioning of three employees by high level manager in her office held noncoercive where the questioning was non-confrontational and limited to asking employees why they believed they needed a union); *N.L.R.B.* v. *Village IX, Inc.*, 723 F.2d. 1360, 1365-69 (7th Cir. 1982) (acknowledging employer's legitimate interest in finding out whether union has talked to employees, and holding employer does not violate Section 8(a)(1) if he merely asks without pressing inquiry contrary to employee wishes or utters coercive statement).

2. Paragraph 5(f): The Credible Evidence Establishes That Respondent Did Not Violate the Act by Singling Employees Out For Their Union Activities.

The evidence offered at the hearing about "singling out" employees by Respondent concerns Dave Pickett's January 6, 2015 informational meeting with a small group of maintenance employees. Although General Counsel alleges that Pickett intimidated and harassed Nick Mitchell by singling him out for his union activities at this meeting, the evidence does not support this allegation.

There is no evidence that Pickett attributed any union activities to Mitchell. None of General Counsel's witnesses recalled any specific question or activity that Pickett allegedly directed to Mitchell. Instead, they offered only vague generalities along the lines of "would you like to answer this one, Nick?" That is hardly a statement that Mitchell was involved in specific union activities. More importantly, though, testimony from employee Hartwig confirmed that it was Hartwig, *not Pickett*, who directed questions to Mitchell at the meeting. Although Mitchell now claims that Pickett asked him to respond to Hartwig's question, the more plausible account is that described by Pickett when he said, "ask the Union," Mitchell interpreted that as a reference to himself because he had voluntarily taken on a role as spokesperson for the employees and, in

addition, employee Hartwig (and likely others) was looking directly to Mitchell for a response. Pickett's account is supported by Mosser, who testified that Hartwig asked Mitchell, "What can a union do for me?" (Tr. 341.) Mitchell drew attention to himself, employees reacted by asking Mitchell questions about the Union, and now Mitchell is trying to attribute that to Pickett.

If the testimony of Hartwig, Pickett, and Mosser is credited, clearly there was nothing coercive, intimidating or harassing in this encounter. Even if the Judge believes part or all of employee Mitchell's version of this meeting, it hardly amounts to an unfair labor practice or a basis for setting aside the election due to its innocuous and isolated nature, and the absence of any indication that this incident interfered with the employees' freedom of choice in the election. *See Northern Wire Corp.*, 291 NLRB 727 (1988) (no violation where supervisor's conduct and remarks were ambiguous and did not contain threat). There are no words attributed to Pickett that could be remotely described as threatening or harassing. Accordingly, this allegation should be dismissed.

D. GENERAL COUNSEL FAILED TO PROVE OBJECTIONABLE CONDUCT SUFFICIENT TO SET ASIDE THE ELECTION

Prior to the hearing, the Regional Director approved the Union's withdrawal of Objection Nos. 1 and 5, and consolidated Objection Nos. 2, 3, and 4 with the matters to be litigated under the Consolidated Complaint because those objections were directly overlapping with the allegations of the Consolidated Complaint. For the reasons explained above, the General Counsel failed to introduce sufficient evidence to prove any violation of the Act. In addition, the evidence makes clear that Petitioner's Objections should be overruled as explained below.

1. General Counsel Has Not Met the Board's Required Showing Necessary to Set Aside the Results of the Election

A Board representation election is presumed valid and the burden is on the objecting party to prove that the election is invalid. *NLRB v. WFMT*, 997 F.2d 269, 274 (7th Cir. 1993) (citing

N.L.R.B. v. Mattison Machine Works, 365 U.S. 123, 124 (1961)). In deciding whether to uphold the results of an election, the Board assesses whether the employees were able to fully and fairly exercise their freedom of choice in casting their ballots. Specific factors analyzed by the Board in this process include: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among the bargaining unit employees; (3) the number of bargaining unit employees subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of misconduct in the minds of bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of the misconduct by the opposing party in canceling out the effect of the original misconduct; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to a party to the election. *Avis Rent-A-Car Systems*, 280 NLRB 580, 581 (1986).

In applying these factors, the ultimate test in deciding whether to set aside the election is "whether the character of the conduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice of representatives impossible." *Hamilton Label Service,* 243 NLRB 598 (1979). It is well-settled that "representation elections are not lightly set aside." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991). Accordingly, "a party objecting to the validity of an election on the grounds of improper pre-election [or election] conduct must shoulder a heavy burden of proof to demonstrate by specific evidence that the election was unfair." *NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961).

2. The Union's Objections Should Be Overruled for the Same Reasons That the Allegations of the Consolidated Complaint Should be Dismissed

Petitioner's Objection No. 2 alleges that:

> Laboratory conditions were destroyed and objectionable conduct committed when the above named employer through its Managers, Supervisors and/or Agents in an attempt to discourage employees from

> exercising their protected rights to campaign for the Union intimidated and harassed Union Supporters in captive audience meetings and on the production floor.

The Regional Director stated that Objection 2 is based on the conduct more specifically set forth and alleged as an unfair labor practice in paragraph 5(f) of the Consolidated Complaint, which alleges: "About January 6, 2015, Respondent, by David Pickett, at Respondent's facility, intimidated and harassed employees by singling them out for their union activities in front of other employees." (G.C. Ex. 1(l), at p. 2.) Based on the evidence in the record, as discussed above, Pickett's alleged statements during the January 6, 2015 meeting with a small group of maintenance employees were neither intimidating nor harassing. There is no evidence that Pickett's comments were likely to cause fear among the bargaining unit employees nor were they repeated to the vast majority of the employees who were not at the meeting. This single, isolated incident allegedly occurred nearly two weeks before the secret ballot election was conducted. General Counsel did not introduce any other evidence regarding the January 6, 2015 meeting. Accordingly, for the reasons discussed in connection with the corresponding unfair labor practice charge, Objection No. 2 should be overruled.

Petitioner's Objection No. 3 alleges that:

> Laboratory conditions were destroyed and objectionable conduct committed when the above named employer through its Managers, Supervisors and/or Agents punished employees for signing union cards by denying employees personal holidays after the petition for election was filed. This has never happened in the past.

The Regional Director stated that Objection 3 is based on the conduct more specifically set forth and alleged as an unfair labor practice in paragraphs 6(b) and (c) of the Consolidated Complaint, which alleges in relevant part: "(b) Since about January 4, 2015, Respondent denied maintenance employees' personal holidays." (G.C. Ex. 1(l), at p. 2.) For the reasons expressed above, Respondent's denial of a few Personal Holiday requests was based on application of the

well-known Approved Time-Off Guidelines, which were applied consistently before and after the union representation petition was filed. Moreover, there was no evidence presented by General Counsel that maintenance employees were treated any differently than non-maintenance employees, who were also denied Personal Holiday requests when doing so would compromise the staffing requirements for their department. Finally, General Counsel offered absolutely no evidence that Respondent punished employees for signing union cards by denying Personal Holidays after the petition for election was filed. Indeed, the evidence shows that the one person who was outspoken about his union support, Nick Mitchell, was granted the Personal Holiday request he made on January 4, 2015. Accordingly, Objection No. 3 should be overruled.

Petitioner's Objection No. 4 alleges that:

> Laboratory conditions were destroyed and objectionable conduct committed when the above named employer through its Managers, Supervisors and/or Agents gave the impression of surveillance of union activities.

The Regional Director stated that Objection 4 is based on the conduct more specifically set forth and alleged as an unfair labor practice in paragraphs 5(c)(i) and (ii) of the Consolidated Complaint, which alleges: "(c) Since about December 17, 2014, Respondent, by Butch Rentmeister, at Respondent's facility, by changing the location and length of its maintenance employees' breaks: (i) created an impression among its employees that their union activities were under surveillance by Respondent, and (ii) engaged in surveillance of employees' union activities." (G.C. Ex. 1(l), at p. 2.) Respondent never changed the length of its maintenance employees' breaks and there is no evidence disputing that fact. In addition, Respondent's decision to change the location of some, but not all, of its maintenance employees' breaks was proven to have been made for the legitimate business reason of eliminating unnecessary travel/walking time. The change for some employees occurred in September 2014, months before the union representation petition was

filed, and occurred for the remaining employees in December, 2015 when Butch Rentmeister became the Fermentation Maintenance Supervisor. No credible evidence was presented that Respondent conducted surveillance of employees' union activities during paid rest breaks, nor was there any evidence presented that Respondent created an impression of surveillance. General Counsel did not present any evidence in addition what has been discussed above in connection with the corresponding charge. Accordingly, Objection No. 4 should be overruled.

CONCLUSION

For the reasons explained above, Respondent respectfully requests that the Consolidated Complaint be dismissed and the Objections be overruled.

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CERTIFICATE OF SERVICE

I certify that a copy of Employer/Respondent's Post Hearing Brief To The Administrative Law Judge was filed with the National Labor Relations Board and electronically served on the following on this 28th day of August, 2015:

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